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December 10, 2014

Clay Monroe
Assistant Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 25th Floor
New York NY 10007

Re: Follow-up to our meeting on December 2, 2014

Dear Clay:

We appreciate the time you and others took for our meeting to discuss the request of the Members of the Berry's Creek Cooperating Parties Group that General Notice Letters ("GNLs") be issued to certain public entities that are responsible parties at the Berry's Creek Study Area.

I will not repeat here the reasons we discussed for issuance of those GNLs, some of which were referenced in Steve Herman's letter to Walter Mugdan dated October 22, 2014. I write instead to follow up on a comment made toward the end of our meeting expressing concern about issuing GNLs to POTWs that "pass through" hazardous substances generated by industrial generators.

As an initial matter, there is no basis in law or EPA policy or guidance to treat POTWs that are potentially responsible parties ("PRPs") differently from the way the Agency is treating non-public PRPs in the Study Area. Deputy Assistant Administrator Barry Breen confirmed that view in his August 14, 2014 written response to questions posed by Senator Vitter,[1] where Mr. Breen said that it is the policy of EPA Region 2 "to have all PRPs participate at an appropriate level in carrying the burden of the costs of remediation ... [and to] use, as appropriate, the various enforcement tools provided by Congress in CERCLA to effectuate this goal." When asked about the potential liability of local municipalities, Mr. Breen stated that "[t]he agency will continue to assess the potential liability of municipal and non-municipal entities and **take appropriate action to ensure that those with legal responsibility are included in the enforcement process**." (Emphasis added.) That is what our Group is asking the Region to do here.

[1] U.S. Environmental Protection Agency Responses to Questions for the Record, June 10, 2014 Hearing Before the Oversight Subcommittee, Environmental and Public Works Committee, U.S. Senate, at 9 (Aug. 14, 2014).

We note that, as FTI discussed with you earlier, the municipal entities mentioned during our meeting functioned as more than mere conduits. For example:

- The Rutherford-East Rutherford-Carlstadt (RERC) Joint Meeting POTW operated from 1941 to 1988, and was not issued a federal permit until 1979, wherein it was directed to cease operations due to decades of poor treatment of influent and failure to meet state requirements for effluent to Berry's Creek.

- The RERC Joint Meeting POTW also was identified, through its sludge lagoons, as a source of pollution to groundwater proximate to Berry's Creek.

- The RERC Joint Meeting POTW intentionally disposed of waste containing mercury up to 10,000 ppb along the banks of Berry's Creek or its tributaries.

- The Wood-Ridge POTW operated from 1925 to 1991, and was not issued a federal permit until 1978. This POTW conducted bypassing of effluent to Berry's Creek. EPA Region II filed a complaint against the Borough of Wood-Ridge for these and other ongoing releases. The borough was cited as being in "significant violation" of its permit for discharges, including discharges containing mercury. An Administrative Consent Order was executed between the state and the borough for these and other deficiencies, requiring the POTW to cease operation.

- Bergen County was the operator of the Lyndhurst and Rutherford Landfills that operated for decades along Berry's Creek and its tributaries, accepting for disposal significant quantities of industrial and chemical waste.

- Lyndhurst Township was a partial owner of, and a source to, the Lyndhurst Landfill. Lyndhurst Township was also a source to the Rutherford Landfill.

- Rutherford Borough was a partial owner of Rutherford Landfill.

For these reasons, the public entities we discussed during our meeting are far more than mere conduits for the effluent of other entities.

Even if the POTWs at issue had just been conduits for industrial effluent to the Study Area, however, they would still be liable under CERCLA. Holding them accountable would be consistent with the Region's policy, as Mr. Breen explained, and with precedents in other cases.

In Wisconsin, for example, the City of Appleton and the Neenah-Menasha Sewerage System had to resolve their CERCLA liability by each paying $5.2M to the federal and state governments because, as alleged in the governments' Complaint, they owned and operated POTWs that had received industrially generated PCBs and discharged them into the Lower Fox

River. (A copy of the relevant portions of the government's Complaint is attached.) Similarly, at the Metal Bank Superfund Site in Pennsylvania, the court held that a CSO of the City of Philadelphia is a facility under CERCLA, that the City was the owner and operator of that facility, and that if the plaintiffs could show that hazardous substances had been released from that facility to the sediments comprising part of the Site, the City may be held liable for contribution toward the cleanup costs. The original source of the contaminants was not relevant to the decision. *See United States v. Union Corp.*, 277 F. Supp. 2d 478 (E.D. Penn. 2003). In another case holding a POTW liable under CERCLA, the Fourth Circuit stressed that

> [t]he infeasibility of perfectly internalizing past costs compared to the potentially perfect ability to internalize future costs may explain why Congress limited the liability of POTWs under RCRA and CWA, both forward-looking statutes, yet did not exempt POTWs from liability under CERCLA, a remedial statute. See Goodrich, 958 F.2d at 1202.
>
> We sit as a court, not a super-legislature. While the public policy arguments raised by WSSC may be meritorious, we can only presume that those arguments were weighed and rejected by Congress when it enacted CERCLA without including a broad exemption for state and local governments or their POTWs. Therefore, we affirm the district court's finding that WSSC's sewer pipes are a "facility" under CERCLA.

*Westfarm Associates Limited Partnership et al. v. Washington Suburban Sanitary Commission*, 66 F.3d 669, 680 (4th Cir. 1995).

In Los Angeles, the United States and State of California settled CERCLA claims against several local governmental entities for $22 million in response costs (on behalf of EPA) and $23.7 million in natural resource damages (on behalf of the Natural Resource Trustees). *See* Amended Consent Decree, *United States, et al. v. Montrose Chemical Corporation of California, et al.*, No. CV 90-3122-AAH (JRx) at 17-18 (N.D. Cal., entered August 24, 1999). The consent decree describes the role of the local government entities as "passive conduits of wastewater and stormwater," where contaminants "passed through collection system(s) and ocean outfall(s) owned and/or operated" by the local government entities. *See Amended Consent Decree* at 12-13. Notwithstanding the characterization of the local entities as "passive conduits," the governments took appropriate action to ensure that local public entities with legal responsibility were included in the enforcement process. In that case, the governments deemed a collective contribution by the local public entities of about 20% of the total estimated response costs and NRD to be reasonable. *Id*. at 17.

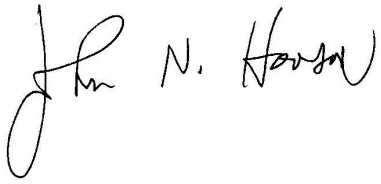
You are well aware, of course, of the unilateral order that EPA Region 2 recently issued to the City of New York for participation in the design of the dredging remedy for the Gowanus Canal. EPA's correspondence with the City described the multiple bases for the City's liability,

including its lengthy history of owning and operating the sewer system that discharged hazardous substances to the Canal. To the extent that the City's liability for Gowanus Canal sediment contamination is based on historical discharges of hazardous substances to the Canal, it is different from the liability of local POTWs for discharges to Berry's Creek only in magnitude, not in type.

As discussed at our meeting, there are many other examples of local government PRPs at sediment sites based at least in part on their ownership and operation of treatment works and/or sewer systems that discharged industrial contaminants into the relevant waterways, including Newtown Creek, NY; Portland Harbor, OR; and the Lower Duwamish Waterway, WA.

I hope this information and the discussion at our meeting will be helpful in the Region's consideration of the Group's request.

Very truly yours,



John N. Hanson

JNH:

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

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| UNITED STATES OF AMERICA and THE STATE OF WISCONSIN,<br><br>Plaintiffs,<br><br>v.<br><br>NCR CORPORATION,<br>APPLETON PAPERS INC.,<br>BROWN COUNTY,<br>CITY OF APPLETON,<br>CITY OF GREEN BAY,<br>CBC COATING, INC.,<br>GEORGIA-PACIFIC CONSUMER PRODUCTS LP,<br>KIMBERLY-CLARK CORPORATION,<br>MENASHA CORP.,<br>NEENAH-MENASHA SEWERAGE COMMISSION,<br>NEWPAGE WISCONSIN SYSTEMS, INC.,<br>P.H. GLATFELTER CO.,<br>U.S. PAPER MILLS CORP., and<br>WTM I COMPANY,<br><br>Defendants. | Civil Action No. 10-C-910 |

**FIRST AMENDED COMPLAINT**

The United States of America, by authority of the Attorney General of the United States, acting at the request and on behalf of the United States Environmental Protection Agency ("EPA") and the Department of the Interior ("DOI"), and the State of Wisconsin (the "State"), by authority of the Attorney General of Wisconsin, acting at the request of the Governor of Wisconsin and on behalf of the Wisconsin Department of Natural Resources ("WDNR") pursuant to Wis. Stat. § 165.25(1), through the undersigned attorneys, file this amended complaint and allege as follows:

actions, and natural resource damages, as alleged below.

City of Appleton

61. The City of Appleton ("Appleton") has owned and/or operated a sewer system and a POTW that is adjacent to the Lower Fox River, to the north of East Newberry Street, in Appleton. As alleged above, Appleton's sewer system and POTW received PCB-containing wastewater from the Appleton Facility owned by NCR and API and the Riverside Facility owned by CBC Coating, and Appleton in turn discharged partially-treated, PCB-containing wastewater from those facilities to the Lower Fox River. Appleton still owns and/or operates the Appleton POTW and its associated sewer system.

62. Appleton therefore: (i) owns and operates a facility from which there have been releases of hazardous substances, and there were releases of hazardous substances from that facility to the Site; and (ii) owned and operated a facility at the time of disposal of hazardous substances at that facility, and there were releases of hazardous substances from that facility to the Site.

63. In light of the foregoing, Appleton is liable to Plaintiffs in this action under: (i) CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1); and (ii) CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

64. This Complaint does not assert claims against Appleton for any response costs associated solely with OU 1. Appleton is liable for other response costs and natural resource damages, as alleged below.

Georgia-Pacific Consumer Products LP

65. Georgia-Pacific Consumer Products LP (formerly known as Fort James Operating Co.) and at least one of its corporate predecessors – Fort Howard Corporation – have owned

108. In light of the foregoing, WTM is liable to Plaintiffs in this action under: (i) CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2); and (ii) CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

109. WTM has resolved its liability for certain response actions and response costs associated with OU 1 of the Site pursuant to the above-referenced Amended Consent Decree in *United States and the State of Wisconsin v. P.H. Glatfelter Co. and WTM I Co.*, Case No. 03-C-0949 (E.D. Wis.), subject to specified terms and conditions set forth in that Amended Decree. For that reason, this Complaint does not assert claims against WTM for "OU 1 Response Activities and Costs" as defined in that Amended Consent Decree, including any claim for costs of response activities for OU 1 incurred after July 1, 2003. WTM nonetheless remains bound to fund and perform certain ongoing obligations under its Amended Consent Decree with the Plaintiffs. WTM also is liable for other response costs, response actions, and natural resource damages, as alleged below.

Neenah-Menasha Sewerage Commission

110. The Neenah-Menasha Sewerage Commission ("NMSC") has owned and/or operated a regional sewer system and a POTW that is adjacent to the Little Lake Butte des Mort segment of the Lower Fox River, at the western end of Garfield Avenue, in Menasha. As alleged above, the NMSC's sewer system and POTW received PCB-containing wastewater from several facilities – including the WTM Facility, the John Strange Facility, and the Kimberly-Clark Neenah and Badger Globe Facilities – and the NMSC in turn discharged partially-treated, PCB-containing wastewater from those facilities to the Lower Fox River. The NMSC still owns and/or operates the NMSC POTW and its associated regional sewer system.

111. The NMSC therefore: (i) owns and operates a facility from which there have

been releases of hazardous substances, and there were releases of hazardous substances from that facility to the Site; and (ii) owned and operated a facility at the time of disposal of hazardous substances at that facility, and there were releases of hazardous substances from that facility to the Site.

112. In light of the foregoing, the NMSC is liable to Plaintiffs in this action under: (i) CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1); and (ii) CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

Brown County

113. Brown County has owned and/or operated two confined disposal facilities ("CDFs") that have been used to contain PCB-contaminated dredged spoil removed from the Site, known as the Renard Island CDF and the Bayport CDF. The Renard Island CDF is an offshore CDF located in the southeastern portion of the bay of Green Bay, east of the mouth of the Fox River. The Bayport CDF is located along the southwestern shore of the bay of Green Bay, west of the mouth of the Fox River. In 1977, the State of Wisconsin granted Brown County title to the submerged lands on which the Renard Island CDF was constructed. Beginning in 1985, Brown County began leasing portions of Bayport CDF from the City of Green Bay, which then owned the relevant real property. Brown County acquired ownership of most of the real property on which the Bayport CDF is situated from the City of Green Bay in 1990, and the County continues to own such property.

114. PCBs have been released to the Site from the Renard Island CDF and the Bayport CDF during the time that those facilities were owned and/or operated by Brown County.

115. Brown County therefore: (i) owns and operates a facility from which there have been releases of hazardous substances, and there were releases of hazardous substances from that